

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

December 30, 2005

CRIMSON STONE,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 2005-325-RM
v.	:	Citation No. 6088368;08/25/2005
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Crimson Stone
ADMINISTRATION, (MSHA),	:	Mine ID No. 01-02945
Respondent	:	

DECISION

Appearances: Bruce H. Henderson, Esq., Phelps, Jenkins, Gibson & Fowler, L.L.P.
Tuscaloosa, Alabama, on behalf of the Contestant;
Amy R. Walker, Esq., Office of the Solicitor, U.S. Dept. of Labor, Atlanta,
Georgia, on behalf of the Respondent.

Before: Judge Melick

This case was filed by Crimson Stone pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the “Act,” to challenge Citation No. 6088368 issued by the Secretary on August 25, 2005. The citation was issued under Section 104(d)(1) of the Act and, as amended, alleges a “significant and substantial” violation of the mandatory standard at 30 C.F.R. § 56.14107(a).¹ The general issue before me is whether

¹ Section 104 (d)(1) of the Act provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those person referred to in

Crimson Stone violated the cited standard and, if so, whether the violation was “significant and substantial” and the result of “unwarrantable failure.”

Citation No. 6088368 alleges as follows:

The guard that provided protection of persons from the tail pulley, head pulley and chain drive and on the conveyors that take the rock from the dry plant crusher to the screen deck, was not being maintained. The guard was hanging and it was easy to come into contact with the moving machine parts. Employees working/traveling near this area were exposed to the possibility of injury, from entanglement hazards, and/or pinch points. Employees work and travel this area daily.

This area has been cited for guarding in the previous two inspections and the foreman should have been aware of the condition. This condition shows unwarrantable failure of management to provide and maintain a secure guard at this location.

The cited standard, 30 C.F.R., § 56.14107 (a), provides that: “[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, fly wheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.”

Inspector Doniece Schlick of the Department of Labor’s Mine Safety and Health Administration (MSHA), has a Bachelor of Science degree in mining engineering from the University of Alabama, prior mining industry experience and 15 years experience with MSHA. Ms. Schlick began her inspection of the Crimson Stone operation on August 25, 2005.

The Crimson Stone mine is comprised of three plant operations: the wet plant, dry plant and excavator. Before commencing her inspection of the dry plant, Ms. Schlick “believed” that the noise she heard from the direction of that plant indicated that it was operating. Admittedly however, she did not actually see the plant in operation and at the time of her actual inspection it was in fact not operating. At the time of her inspection she observed “particles” falling off of the belt. She therefore surmised that the belt had recently been operating.

Upon inspection of the dry plant, Schlick noted that a guard on the right side of the conveyor was “worn out” and hanging loose, exposing pinch points at the chain drive, head pulley and tail pulley (See Exhibit G-4). She noted that the head pulley pinch point was located about chest high above ground level, the chain drive elbow high and the belt and tail pulley knee high. She testified that she stood 5 foot 5 inches in height. She further testified that the dry plant was “energized” and not “locked out.”

subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

Inspector Schlick testified that even if the guard had been properly bolted in position, it would still not have provided adequate protection. It had lost several rows of protective wire mesh and would have been of insufficient size to have provided adequate guarding of the noted pinch points. The cited condition was abated by constructing additional guarding as depicted in photographic exhibits G-5 and G-7.

Mine supervisor William Hunter testified that he was responsible for safety at the mine. Hunter testified that the last time he had seen the guard it had been bolted into position. He acknowledged in reference to the size and shape of the guard that there was no other difference from the time he had last seen it. It may therefore reasonably be inferred that no other guarding had been provided on the top or that side of the pinch points cited herein. Miller noted that material is cleaned up beneath the belt once or twice a day and that rollers and bearings must be greased.

Recalled as a witness for the operator, Hunter testified that the dry plant was not operating at the time of the inspection and indeed it had last operated some two to three weeks before. Hunter also testified that not only was the dry plant not operating that day but the power to the dry plant was not on. According to Hunter, it was company policy not to run two crushers at the same time and he believed there was inadequate power to run two crushers at the same time. Since the wet plant crusher was admittedly operating on that date it may be inferred from Hunter's testimony, if credible, that the dry plant crusher was not operating that day.

Crimson Stone President James Sanders was not present at the mine when the citation was issued. He testified that the dry plant is never operated while other plants are operating at the mine because of the high cost of doing so. He also believed that there was inadequate power to operate more than one plant at the same time.

Crimson Stone maintenance man Donald Hughes testified that he cleans up accumulations under the dry plant by using a "skid loader". Hughes testified that he does not use a shovel to clean under the plant but rather remains inside the "skid loader". According to Hughes, on the day before the citation was issued, he struck the guard with the "skid loader" and tore it loose. He claims that the dry plant was not operating on August 25th, the date of the citation and that the "main breaker" had shut off the power to that location.

Respondent does not dispute the condition of the cited guard or that contact with the pinch points could cause injury. It also acknowledges in its brief that "[t]he guard had clearly been pulled off at the bottom and was hanging by one bolt that attached the wire mesh guard to the conveyor" (Respondent's Brief p.5). Within this framework of undisputed evidence, I conclude that the violation is proven as charged. In reaching this conclusion I have not disregarded Respondent's argument that the Secretary failed to prove that the dry plant was actually operating with the defective guard when it was cited. The standard at bar does not, however, require such proof.

I also find that the violation was “significant and substantial”. A violation is properly designated as “significant and substantial” if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard - that is, a measure of danger to safety - - contributed to by the violation, (3) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g* 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

In attempting to prove that the violation was “significant and substantial” the Secretary elicited testimony from Inspector Schlick as found in the following colloquy:

- Q. You cited - - you assessed the citation as an [S&S] citation; is that right?
A. **Yes, I did.**
Q. And have you received any training from MSHA about pinch point guards?
A. **Yes, I have.**
Q. Have you investigated any accidents in relation to inadequate guards?
A. **Yes, I have.**
Q. Have you reviewed any accident reports related to inadequate guards?
A. **Yes, I have.**
Q. In that experience, what sorts of injuries are likely to occur as a result of inadequate guards?
A. **The injury that occurred with the guards are always severe and fatal.**
Q. Can you give us some examples?
A. **This year we’ve had three guards - -**
Mr. HENDERSON: Objection. Relevance, Your Honor.
Ms. WALKER: Your Honor, I’m trying to establish S&S.

- THE COURT: Over ruled. Do you recall the question?**
- Q.** I asked for examples of injuries that you're familiar with.
Mr. HENDERSON: And I - - okay, Your Honor.
THE COURT: Over ruled.
- A.** **This year alone we've had three different fatality incidents regarding one of them that we had in Mississippi in a plant that would have been similar to the one at the Crimson Stone Plant. A gentleman's raincoat was caught in the bottom roller and it broke his neck.**
- Q.** In the accidents related to insufficient guarding, do all of those accidents occur like inadvertent contact pinch points?
- A.** **No.**
- Q.** What other sorts of situations have occurred?
- A.** **Actually - -**
Mr. HENDERSON: Objection, Your Honor. Now, we're in general testimony that offers nothing.
THE COURT: Over ruled.
- A.** **This year we have data that shows actually maintenance people and foremen [sic] are coming in to contact with moving parts because they are trying to eliminate a problem from pieces of rebar getting caught in the tail pulley. They'll try to reach in and jerk it out.**
- Q.** You're aware of accidents that have resulted as intentional contact?
- A.** **Yes.**
- Q.** You assess the citation again as S&S?
- A.** **Guarding accidents are our highest area of fatalities and incidents right now. That's why we're discussing guards when we go on inspections.**
- Q.** What did this particular plant made injury reasonable likely?
- A.** **This area as depicted in Government's 6 is an easily accessible area. The vehicle is less than five feet from the guard. This here is a traveled area. You have to walk by this area where the vertical curves are open. They are close within 10 or 15 feet. One of the main roadways around the plant is right there so I would assume that with it's proximity and the traveled ways being close. You have to grease these pulleys and that's usually maintenance that's done three or more times a week.**
- Q.** Did you see any evidence in the work area depicted - - well, in all of the pictures that we've introduced so far that there was actually that human beings actually worked in that area?
- A.** **There was. It's obvious that is well traveled or beaten down. There was a shovel laying up against the trailer.**
- Q.** Approximately how far away from the cited area was the shovel?
- A.** **Ten feet, five feet.**
- Q.** How many employees to your knowledge - - how many employees does Crimson Stone have?
- A.** **Four.**

- Q.** And does the number of employees affect your assessment of the likelihood of a injury - - sorry. Let me rephrase. To your opinion in your experience does the low number of employees make an injury less likely?
- A.** **No, it does not.**
- Q.** Why?
- A.** **The likelihood that an accident would happen is that people traveled that frequently.**

While the Secretary could no doubt have provided more particularized testimony to support her findings herein I find that this evidence considered in conjunction with the corroborative photograph in evidence (Exhibit G-4) and the inferences to be drawn therefrom are sufficient to sustain the Secretary's findings that the violation was "significant and substantial".

I also find that the violation was the result of the operator's "unwarrantable failure". Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991); *see also Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure and recognized that a heightened standard of care is required of such individuals. *See Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995) (heightened standard of care required of section foreman and mine superintendent).

In finding that the violation was the result of "unwarrantable failure" I have not disregarded the testimony of maintenance man Hughes that on the afternoon of the day before the violation was cited he had torn the cited guard loose and the testimony of Supervisor Hunter that he did not see the damaged guard before the citation was issued at 9:45 the next morning. Ordinarily such circumstances would mitigate against the high level of negligence required for an unwarrantable finding. However, based on the credible evidence that the guard was in such an obviously degraded condition that it would have been deficient even if it had been properly in position, I conclude that Supervisor Hunter had prior knowledge that the guarding at the location was seriously deficient and that he failed to remedy that condition. In sum, it may reasonably be inferred that Supervisor Hunter had seen the pinch points at issue at a time when only protected by the badly deteriorated guard, yet failed to provide fully adequate guarding. Under the circumstances I conclude that an agent of the operator knew of a violative condition well before the day it was cited and yet failed to take corrective measures. This evidence constitutes the level of gross negligence necessary to support unwarrantable findings.

I also note that this operator had twice before, in August 2004 and January 2005, been cited for inadequate guarding on the same conveyor as cited herein. Prior similar violations place mine operators on heightened alert for similar violative conditions and notice that greater efforts are required to assure compliance. See *Peabody Coal Company*, 14 FMSHRC 1258 at 1263-4 (August 1992) and *Deshetty employed by Island Creek Coal Company*, 16 FMSHRC 1040, 1051 (May 1994). The evidence herein of two recent similar violations thus provides an independent basis for finding “unwarrantable failure”.

Under the circumstances, I find that the violation is proven as charged, that it was “significant and substantial” and that it was the result of the operator’s “unwarrantable failure.”

ORDER

Citation No. 6088368 is hereby affirmed as a citation issued pursuant to Section 104 (d)(1) of the Act. Contest Proceeding Docket No. SE 2005-325-RM is therefore dismissed.

Gary Melick
Administrative Law Judge
202-434-9977

Distribution: (Certified Mail)

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